

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Frontier Telephone Petition for Declaratory)	WC Docket No. 05-276
Ruling Regarding the Application of Access)	
Charges to IP Transported Calls)	

**REPLY COMMENTS
of the
INDEPENDENT TELEPHONE AND TELECOMMUNICATIONS ALLIANCE
NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc.;
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION;
ORGANIZATION FOR THE PROMOTION AND
ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES;
UNITED STATES TELECOM ASSOCIATION; and the
WESTERN TELECOMMUNICATIONS ALLIANCE**

Frontier's *Petition*¹ should be granted as expeditiously as possible, concurrent with the SBC petition in the same docket², to send a clear message to carriers and service providers that use local exchange carrier (LEC) facilities to originate or terminate long distance calls that they must pay access charges for such use. Moreover, as commenters have made clear, Frontier Telephone is not the only carrier experiencing evasion of its access charges. There is a proliferation of such cases. Without clear and expeditious action by the Commission in this matter, the financial viability of local networks is at risk, as is the stability of the Universal Service Fund.

¹ Petition for Declaratory Ruling that USA DataNet Corp is Liable for Originating Interstate Access Charges When it Uses Feature Group A Dialing to Originate Long Distance Calls, WC Docket No. 05-276 (Nov. 23, 2005) (*Frontier Petition*).

² Petition of SBC Petition of the SBC ILECs for a Declaratory Ruling, WC Docket No. 05-276 (Sept. 21, 2005) (*SBC Petition*); VarTec's Petition for Declaratory Ruling, WC Docket No. 05-276 (Aug. 20, 2004) (*VarTec Petition*). The Commission has consolidated its review of Frontier's petition with its review of SBC and Vartec's filings. See *Public Notice*, DA 05-2514 (rel. Sept. 26, 2005) at 2.

I. DATANET USES FRONTIER’S FACILITIES TO ORIGINATE INTEREXCHANGE TELECOMMUNICATIONS SERVICES AND MUST PAY FOR THAT USAGE

Under section 69.5(b) of the Commission’s rules, access charges “shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.” There is no dispute that USA Datanet Corp. uses Frontier’s local exchange switching facilities for the provision of interstate services. It claims, however, it is not subject to access charges because it supposedly provides an information service rather than a telecommunications service, and also argues it does not owe Frontier access charges because it obtains local access facilities from PAETEC, which is a competitive local exchange carrier (CLEC).³

The comments show, however, that Datanet is indeed providing ordinary long-distance voice telecommunications services. The Commission has already determined that use of Internet protocol (IP) technology to transport calls does not transform an interexchange telecommunications service into an information service.⁴ As USTelecom points out, Datanet is using IP, “solely as a transmission protocol, and not to provide an information service.”⁵ The New York Public Service Commission has already found the service provided by DataNet to be a “simple, transparent long distance telephone service, virtually identical to traditional circuit-switched carriers” and has accordingly ordered

³ USA Datanet at 2 (herein referred to as “Datanet”).

⁴ Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, WC Docket No. 02-361, *Memorandum Opinion & Order*, 19 FCC Rcd 7457 (2004) (AT&T “*IP-in-the-Middle*” Order).

⁵ USTelecom at 13.

Datanet to pay intrastate access charges.⁶ Datanet has indirectly conceded that a portion of its traffic is interstate access when it supplied a percent interstate usage factor (PIU) for intrastate access services that allocate a portion of its usage to interstate.⁷

As for Datanet's claim that it has not ordered service directly from Frontier, commenters point out Datanet knew full well that it was using Frontier's access network to allow its customers to make long distance calls. AT&T notes that Datanet actively sought Frontier customers with full knowledge that these customers could only reach Datanet via Frontier's network.⁸ Moreover, "far from taking reasonable steps to prevent the receipt of access services, Datanet has gone to great lengths to receive such services without Frontier's knowledge."⁹ Even the CLEC from whom Datanet orders service recognizes that Datanet owes Frontier access. "PAETEC commends Frontier for directing its collection efforts at the true access customer, Datanet, rather than attempting to implicate PAETEC as well. Frontier correctly recognizes that PAETEC is a joint provider of switched access, acting in conjunction with Frontier to provide exchange access to their joint customer, Datanet" ¹⁰

As Verizon points out, "The only variation here (*from the AT&T case*) is that the calls originate from ILEC end users who dial a seven-digit number (in this case provided by a CLEC), obtain a second dial tone, and then dial the number of the person they are calling

⁶ See Complaint of Frontier Telephone of Rochester Against USDataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges, *Order Requesting Payment of Intrastate Carrier Access Charges*, Case 01-C-1119 (May 31, 2002) at 8-9.

⁷ NYSTA at 5.

⁸ AT&T at 8.

⁹ AT&T at 9.

¹⁰ PAETEC at 1

– in other words, Feature Group A access. This is a distinction without a difference.”¹¹

The United States District Court Western District of New York also acknowledged this when issuing a ruling on Frontier’s collection action, stating it had “little doubt that Datanet will ultimately be required to compensate Frontier in some way. Regardless of how its service is classified, Datanet directly or indirectly benefits from the PSTN [public switched telephone network]. And as discussed above, the FCC obviously intends to require those who use the PSTN to pay for the privilege.”¹²

In sum, there is no reasonable basis for Datanet to claim that it should be exempt from paying interstate as well as intrastate access charges. The Commission should confirm this by issuing the requested declaratory ruling as soon as possible.

II. THE QUESTION OF WHETHER ACCESS CHARGES APPLY IS PROPERLY BEFORE THE FCC FOR AN IMMEDIATE DECISION

As noted above, Frontier filed a claim for recovery of unpaid access charges in the District Court as directed by the Commission.¹³ Since the district court was uncertain as to the applicability of the Commission’s rules in this specific instance, it decided to defer resolution of the case until the Commission issues some further clarification of the matter. Datanet claims, however, that Frontier’s petition was improperly filed before the Commission because its collection action remains pending before the district court and

¹¹ Verizon at 2.

¹² Frontier Tel. of Rochester, Inc., v. USADatanet Corp., No. CV-6056-CJS, 386 F.Supp. 2d. 144, 150 n.4 (W.D.N.Y. 2005) (*District Court Decision*).

¹³ In the AT&T “IP-in-the-Middle” Order, n. 93, the Commission stated, “Under sections 206-209 of the Act, the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges. Therefore we expect that LECs will file any claims for recovery of unpaid access charges in state or federal courts, as appropriate.”

because the court's order denying Datanet's dismissal petition by its terms does not specifically seek a determination by the Commission.¹⁴

Datanet's procedural objections are without merit. In its analysis, the district court agreed that the AT&T "IP in the Middle" decision is very close to being dispositive of Datanet's claims but found that order "not entirely on point" because of supposed differences in the way long distance calls are dialed.¹⁵ As several commenters explain, the fact that Datanet uses Feature Group A local access connections to originate calls (as opposed to the Feature Group C or D connections used by AT&T and other long distance carriers) makes no difference to the analysis.¹⁶ First, the IP-in-the-Middle *Order* was not limited to 1+ dialed calls. It is clear from a contextual reading of the *Order* that all references to 1+ dialing only serve either to describe how AT&T's service worked or to highlight the inescapable fact that such IP-in-the-Middle services are used and function in the exact same manner as its time division multiplexed (TDM) counterparts. Similarly, Datanet has not altered or enhanced the manner in which end users make or receive FGA calls. Moreover, the nature of the dialed digits is irrelevant as the Commission expressly emphasized that its *Order* covered any interexchange service that: "1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; 2) originates and terminates on the public switched telephone network (PSTN); and 3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the

¹⁴ Datanet at 3.

¹⁵ *District Court Decision* at 150.

¹⁶ This point was not lost on the court, which stated it "suspects that the FCC will ultimately agree" that the call is not different from any other 1+ voice call, notwithstanding "Datanet's dialing system is different from AT&T's." *Id.*

provider's use of IP technology.”¹⁷ The Commission should promptly affirm this key fact so that Frontier's collection action can proceed.¹⁸

Datanet also argues Frontier's petition is barred by section 207 of the Act, which prohibits persons from seeking damages both from a court and the Commission at the same time.¹⁹ Datanet cites the *Fairmount Complaint Order* in support of its argument.²⁰ In *Fairmount*, however, the Commission held section 207 did not bar a customer's administrative complaint where it is shown that the complainant was not seeking double recovery of damages and where it did not appear the remedies sought were mutually exclusive.²¹ Since Frontier is not seeking damages before the Commission, it cannot be said to be seeking “double recovery for the same damages” in two forums at the same time. Also, there is no mutuality of remedies with respect to Frontier's lawsuit, which seeks damages for the nonpayment of access charges, and its instant petition for declaratory ruling which seeks only a Commission declaration of the applicable law. Pursuant to the *Fairmount Complaint Order*, the two proceedings—one judicial and the other administrative—are, therefore, not inconsistent and not barred by section 207.²²

¹⁷ *AT&T IP-in-the-Middle Order* at ¶ 1. As discussed above, Datanet's long distance service meets these criteria and is thus subject to access charges.

¹⁸ Commenters opposing Frontier's petition argue that it improperly asks the Commission to decide factual matters that should instead be addressed by the court or via FCC enforcement proceedings. *See e.g.*, VON Coalition at 5, Earthlink at 3. Grant of Frontier's petition will, in fact, allow the court to move forward and resolve these factual issues in a timely fashion.

¹⁹ Datanet at 3, *et seq.*

²⁰ *Id.* at 7, *citing* Fairmount Tel. Co. v. Southern Bell Tel. & Tel. Co., *Memorandum Opinion & Order*, 53 Rad. Reg. 2d 639 (1983) (*Fairmount*).

²¹ *Fairmount* at 643.

²² Another case cited by Datanet, Comsat Corp. v. IDB Mobile Comm., Inc., *Memorandum Opinion & Order*, 15 FCC Rcd 7906 (2000) (*Comsat*), does not support Datanet's position. The *Comsat* case involved

While it is obviously to Datanet's advantage to delay further action in the court proceeding as long as possible, it would be unnecessary (and unwise) for the Commission to decline to issue a declaratory ruling on Frontier's petition pending resolution of the *IP-Enabled Services* proceeding. The fact that the district court declined to grant Frontier's motion for a declaratory ruling in no way bars the Commission from acting on Frontier's petition. Even if the Commission were to accept Datanet's claim in this regard at face value, it bears noting the court stayed Frontier's action pending a decision by the Commission either in the *IP-Enabled Services* proceeding or the *Vartec Petition for Declaratory Ruling*.²³ Since the Commission has elected to consolidate Frontier's petition within its proceeding on the SBC and Vartec petitions, a ruling by the Commission on Frontier's petition as well as the SBC and Vartec petitions would likely be viewed as timely by the district court along with virtually every other commenter in this proceeding.²⁴

In sum, the ball is clearly and correctly in the Commission's court. It was entirely appropriate for Frontier to request a ruling from the Commission to resolve the District Court's questions. The Commission should accordingly provide the district court with

the filing of an FCC complaint for damages for an alleged violation of a federal statute limiting the ability of U.S. satellite service users to purchase from providers other than Comsat, under certain circumstances. The FCC complaint was filed after Comsat had filed a federal court case that raised identical claims for damages and which was dismissed for the failure to state a claim upon which relief could be granted. Comsat was, therefore, in the words of the FCC, a case of *res judicata*. The FCC, in *dicta*, discusses the application of Section 207. It concludes that, despite Comsat's proffer of different legal theories to the court and to the FCC, Comsat was attempting to recover the same damages in two fora. Datanet's reliance on *Mocatta Metals* is likewise misplaced for the same reason. *Id.* at ¶ 28, (citing *Mocatta Metals Corp., v. ITT World Communications, Inc.*, Docket No. 19799, *Memorandum Opinion and Order*, 44 FCC 2d 605 (1973)).

²³ According to the court, "the Vartec matter that is now pending before the FCC also raises an issue that is almost identical to the one being raised in the instant case." *District Court Decision* at 150.

²⁴ See e.g., AT&T at 13, USTelecom at 2, NJ Ratepayer Advocate at 11.

the guidance it seeks by issuing the requested declaratory ruling confirming that access charges apply to Datanet, notwithstanding Datanet's use of Feature Group A dialing arrangements and regardless of whether Datanet takes service directly from Frontier or via a third party carrier.

III. THE COMMISSION MUST ACT PROMPTLY TO DETER FURTHER EVASION OF ACCESS CHARGES AND TO PRESERVE UNIVERSAL SERVICE

Frontier is not the only LEC in New York that is affected by the outcome of this proceeding. The New York State Telephone Association states²⁵ at least six of its member companies have been billing Datanet for over a year and a half and the amount owed has exceeded \$27,000 per rural carrier on average.²⁶

Nor is this problem confined to the State of New York. Many ILECs across the country are experiencing difficulties collecting access charges from similarly-situated carriers. For example, Alaska Communication Systems (ACS) filed an *ex parte* on Dec. 12, 2005 informing the Commission it has identified interstate "IP-in-the-Middle" traffic that is being improperly terminated as local.²⁷ Should the Commission fail to act soon, it is apparent that competitive pressures in the industry will soon force other carriers to resort to the same or similar access avoidance schemes in order to meet competitors' prices. As AT&T has pointed out in another proceeding, continuing Commission silence

²⁵ NYSTA at 3

²⁶ NYSTA at 6 In the same NYSTA survey, it was revealed that the amount of money owed to several of NYSTA's ILEC members from Global NAPS, for example, for terminating interstate access has been growing as well, even since the AT&T Decision. In some cases, these amounts owed exceed \$20,000 per carrier."

²⁷ Letter from Karen Brinkmann, Latham & Watkins, to Marlene H. Dortch, FCC, WC Docket No. 05-275, CC Docket No. 01-92 (Dec. 12, 2005).

on this issue “is effectively leaving these providers to argue that, in order to fulfill their fiduciary duty to maximize corporate resources, they have no choice but to pursue whichever compensation arrangements are within the bounds of the law, most aligned with their business interest.”²⁸

The Associations agree with CenturyTel that, should other carriers adopt these methods,

the future sustainability of universal service could be put in jeopardy as carriers would then have an artificial economic incentive to switch traffic from the PSTN to IP backbone networks to receive a competitive advantage and avoid paying access charges. Such loss in interstate access revenues would compel LECs to either look to the USF and/or end user consumers to make up these revenue shortfalls.²⁹

By taking immediate action in this proceeding, the Commission would send a clear message to carriers and service providers that utilize the public switched network for ordinary interstate long distance calls that they must pay interstate access charges for that use. Without clear and prompt guidance from the Commission, the financial viability of local networks is at risk, as is the stability of the Universal Service Fund.

²⁸ Grande Communications, Inc. Petition for Declaratory Ruling Regarding Self-Certification of IP-Originated VoIP Traffic, WC Docket No. 05-283, *AT&T Comments* (Dec. 12, 2005) at 9-10.

²⁹ CenturyTel at 8-9

IV. CONCLUSION

The Commission should grant Frontier's petition as expeditiously as possible and confirm its previous AT&T "IP-in-the-Middle" *Order* that interstate phone-to-phone calls utilizing Internet protocol (IP) transmission technology are subject both to originating and terminating interstate access charges regardless of the dialing arrangement or whether such calls are routed via intermediate carriers.

Respectfully submitted,

January 24, 2006

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Associations' Reply Comments was served this 24th day of January 2006, by electronic filing and e-mail to the persons listed below.

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